



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 43 OF 2019

MARCLUS KIRANGA NIMROD.....APPLICANT

VERSUS

NIMROD KIBUKU KIRANGA.....RESPONDENT

QUEKENDA HOLDINGS LTD.....INTERESTED PARTY

RULING

This application before me is the Notice of Motion dated 4th November 2019 brought under *Order 40 Rules 1, 2 & 4 CPR, Section 3, 3A CPA and Article 40 of the Constitution* and all enabling provisions of the law. The Applicant is seeking the following orders:-

(1) Spent.

(2) That pending the hearing and determination of this application, the respondent, either by himself, his agent and/or servant be restrained by an injunction from entering into, encroaching, trespassing, selling, alienating or in any manner whatsoever interfering with the property known as L.R. No. KIINE/RUKANGA/2336.

(3) That pending the hearing and determination of the suit, the respondent, either by himself, his agent and/or servant be restrained by an injunction from entering into, encroaching, trespassing, selling, alienating or in any manner whatsoever interfering with the property known as L.R. No. KIINE/RUKANGA/2336.

(4) That costs of and incidental to this application be provided for.

Grounds upon which the application is premised

(1) The plaintiff/applicant purchased the subject property L.R. No. KIINE/RUKANGA/2336 from his sister Tabitha Wathoni Gitemenge who was murdered by the respondent herein and registered it in trust under the name of the respondent who was then a minor for and on behalf of himself and his other children.

(2) That the applicant has filed this suit seeking to compel the respondent's name to be cancelled and the name of the applicant in L.R. No. KIINE/RUKANGA/2336 be in place register in the name of the applicant.

(3) The applicant is apprehensive that the respondent is in the process of selling the suit property which will render the suit a nugatory as well as disinheriting the applicant herein as well as other beneficiaries.

(4) The applicant has since the purchase of the suit property in 2010 from his sister the late been utilizing the land, farming and gainfully providing for his family.

(5) Unless restrained, the respondent may interfere with the parcel thereby causing the plaintiff/applicant irreparable damage with the likelihood of a breach of peace now that he has killed.

Applicant's Statement of Facts

(I) That the respondent is his son from his previous marriage.

(II) That sometime in the year 2010, he was working as an Engineer with Kenya Urban and Rural Authority (KURA). He purchased a parcel of land L.R. No. KIINE/RUKANGA/2336 for a consideration sum of Kenya Shillings one million from his sister the late

Tabitha Wathoni Gitemenge and thereafter registered it in the name of the respondent herein then a minor aged about (fifteen) 15 years.

(III) That he annexed a copy of the Birth certificate and sale agreement as “**M.K.N 1 & 2**” respectively.

(IV) That he registered the said parcel in the name of the respondent in trust for himself and his other children born and unborn as the said land had been bequeathed by his father NIMROD GITEMENGE to his sister Tabitha Wathoni Gitemenge now deceased. He annexed a copy of search as “**M.N.K-3**”

(V) That without his knowledge sometimes thereafter in the year 2011 when the respondent was still a minor, his then wife one Nesy Kuthii Justus went to the Land Registry Kerugoya and the subordinate Court Kerugoya using false documents and information and transferred the land parcel No. KIINE/RUKANGA/2336 to her name from the defendant and immediately thereafter sold it to a third party illegally and fraudulently.

(VI) That when he came to know of it, he filed in the year 2013 ELC No. 737 of 2013 Kerugoya High Court for the recovery of the land to be reverted to the respondent where the Court ordered for it to be reverted to the respondent in March 2019 and was reverted to the name of the respondent now an adult. He annexed a copy of the judgment as “**M.N.K-4**”.

(VII) That during the reversion of the land or the initiation of the suit for recovery of land to the respondent initially was co-operative but later started being un-cooperative and in event turned out to be disinterested because the mother to the respondent was a defendant in the case and he did not want to give evidence against the mother and even went ahead to give conflicting instructions.

(VIII) That on or about 3rd March 2019, the respondent murdered his aunt and my sister Tabitha Wathoni Gitemenge at his home in Sagana and before killing her raped her and is currently on trial under criminal Case No. 4 of 2019 Kerugoya High Court. He annexed a copy of the charge sheet as “**M.N.K-5**”

(IX) That all attempts to engage the respondent to revert the land to him has resulted to extreme acts of hostility and threats and the respondent may dispose the suit land to other parties for his personal gains to the detriment of him and his other beneficiaries aforesaid whereas he became un-cooperative during its recovery in ELC No. 737 of 2013 (Kerugoya).

(X) That his claim against the respondent is for the cancellation of the respondent’s name and the registration of the title No. KIINE/RUKANGA/2336 and in place register the same in his names.

(XI) That the respondent due to his wrong company influence and temperament may harm him, his current wife and children as he has become unruly, refused to work and involved himself in criminal activities in Kirinyaga and Nairobi.

(XII) That he has established a prima facie case to warrant the orders sought in the first instance.

Respondent’s Statements of Facts

The respondent filed a replying affidavit opposing the application sworn on 13th March 2020 and deponed as follows:-

(i) That he is advised by his advocates on record which advise he verily believes to be true that the said application is unfounded, vexatious and an abuse of the Court process and the Court should reject from the onset.

(ii) That the application is founded on wrong principles and/or provisions of law and abuse of the Court process with malicious view to bypass the stay order issued by the Nyeri Court of Appeal in Appeal No. 61 of 2019 where the applicant is a party. He annexed a copy of the stay order as “**N.K.K- 1**”

(iii) That land parcel No. KIINE/RUKANGA/2336 was a subject matter in Kerugoya ELC No. 737 of 2013 and after the judgment QUEKENDA HOLDINGS LTD, the 2nd defendant and the current registered owner of the same were not satisfied with the judgment and appealed to Nyeri Court of Appeal in Appeal No. 61 of 2019.

(iv) That he is not the registered owner of land parcel No. KIINE/RUKANGA/2336 and therefore the issue of selling a land that does not belong to him does not arise. He annexed a copy of the official search marked “**N.K.K-2**”

(v) That the interest of all parties in the said Appeal Case No. 61 of 2019 (Nyeri) are safeguarded as the order for stay is registered and there cannot be any further dealings and/or transactions on the said land parcel.

(vi) That he is further advised by his advocates on record which advise he verily believes to be true that the issues surrounding the transfer of land from himself to the said QUEKENDA HOLDINGS LTD are pending before the Court of Appeal and that it is an abuse of the process to discuss issues pending in the higher Court in an inferior Court.

(vii) That the plaintiff is his biological father however he has reflected his anger on him due to a acrimony arising from separation with his mother who was the 1st defendant in ELC No. 737 (Kerugoya) of 2013 where he has frustrated him to an extent of framing him to have murdered his aunt despite the fact that he was not present during the incident.

(viii) That the authority of this Honourable Court should not be abused to settle marital scores after divorce.

(ix) That he was surprised to be arrested in Ruiru by Sagana DCI Officers and arraigned in Court over murder of his aunt in Kerugoya High Court Cr. Case No. 4 of 2019 which is still pending hearing.

(x) That the plaintiff made an application through the current advocates on record contesting his bond/bail terms however that said malicious application was rejected.

(xi) That the only witness in this murder case is the plaintiff, his wife and his cousin.

(xii) That it is dishonest for the plaintiff to aver that the respondent is a criminal running Criminal Enterprise on both Kirinyaga and Nairobi yet he is the one who has been drugging him to Court all the time over land parcel No. KIINE/RUKANGA/2336. He has never been to Court before in any criminal case apart from the drummed up murder charges against him.

(xiii) That he has noted from the documents filed herein that this cause was filed immediately after his arrest and arraignment which is not a coincidence but a wider scheme to have this matter proceed ex-parte while he was incarcerated.

(xiv) That the plaintiff did not raise any issue in matters relating to KIINE/RUKANGA/2336 before he separated with his biological mother NESSY KUTHII JUSTUS (1st defendant in Kerugoya ELC Cause No. 737 of 2013) as he knew what they had done and the subject matter transferred to the current owner. He never challenged the process to date.

(xv) That he neither instructed the plaintiff nor the firm of M/S KAHUTHU AND KAHUTHU ADVOCATES to act for him in ELC No. 737/2013 (Kerugoya) where he was enjoined as the 2nd plaintiff without his knowledge or consent.

(xvi) That the plaintiff has a vendetta with him for standing with the truth and refusing to come and testify against QUEKENDA HOLDINGS LTD which validly purchased land parcel No. KIINE/RUKANGA/2336 and the plaintiff utilized the proceeds in paying his school fees and his siblings.

(xvii) That he has been advised by his advocates and he verily believes to be true that it is not founded in law for a minor to hold land in trust of an adult.

(xviii) That he was gifted land parcel No. KIINE/RUKANGA/2336 by his aunt who was equally gifted by his grandfather and that the agreement attached and marked **M.K.N-2** was an after-thought.

(xix) That he is further advised by his advocates on record and he verily believes to be true that the plaintiff has neither demonstrated a prima facie case nor irreparable loss likely to be suffered as to the threshold in the celebrated case of *Giella*.

(xx) That he is further advised by his advocates on record which information he believes to be true that the plaintiff will not be prejudiced in any way as the orders of the Court of Appeal supersedes orders of this Honourable Court.

Applicant's Statements of Rejoinder

In a further affidavit sworn on 9th October 2020 and filed in Court on 14th October 2020, the applicant stated as follows:-

(i) That the respondent is my son sired with his former wife Nesy Kuthii Justus.

(ii) That his son's advocate herewith is also his former wife's advocate in other matters related to their former lives with his mother.

(iii) That the replying affidavit is full of falsehood, hatred and issues not known to the respondent but advanced by the mother and his advocate herein through these proceedings.

(iv) That it is true there is an Appeal No. 61 of 2019 Nyeri relating to the same land but by other parties.

(v) That the land No. KIINE/RUKANGA/2336 is no longer registered in the name of the alleged QUEKENDA HOLDINGS LTD but it reverted to the respondent vide an order of the Court and a search issued on 10th April 2019 indicating same enclosed therein and marked as "**M.K.N-1**"

(vi) That unless the said company tampered with the Land registry records after search, the land is registered in the name of the respondent though there is a prohibition.

(vii) That he filed this matter before the Appeal in question to avoid the respondent from transferring the suit land to a third party whilst he held the land in trust form and whereas he is the one who fought tooth and nail to recover the land from a third party sold by his former wife without his knowledge.

(viii) That he is currently in occupation and use of the land as he had always been.

(ix) That the respondent is being influenced by the mother and as of last year, he killed the applicant's sister and the case is still pending in Court whereas the said deceased sister of his is the one he had bought the land from.

(x) That the allegation in the Replying affidavit are mere rhetoric advanced by the respondent's mother through these proceedings.

Legal Analysis

I have considered the Notice of Motion brought under Certificate of urgency dated 4th November 2019. I have also considered the materials both in support and in opposition thereto and the submissions by counsels appearing for the combatants. The crux of the applicant's application is the determination of whether the applicant has established the grounds for the grant of injunction orders. The principles for the grant of injunctive orders was set out in the locus classicus case of ***Giella Vs Cassman Brown Co. Ltd (1973) E.A 358*** as follows:-

- (1) *The applicant must establish a prima facie case.*
- (2) *The applicant will otherwise suffer irreparable injury which cannot be compensated by an award of damages; and*
- (3) *Where the Court is in doubt, the matter can be decided on a balance of convenience.*

The facts as presented by the applicant is that when he filed a case No. 737 of 2013 before this Court with the defendant/respondent as his co-plaintiff, he was not aware that in the year 2011, his ex-wife and also mother to the defendant/respondent one Nussy Kuthii Justus had gone to the Land registry and the subordinate Court (Kerugoya) using false documents and information and transferred the land parcel No. KIINE/RUKANGA/2336 to her name and thereafter sold it to a third party illegally and fraudulently. This Court rendered itself in the ELC Case No. 737/2013 on 22/3/2019 where it inter alia cancelled the title in the name of QUEKENDA HOLDINGS LTD and ordered the register to be rectified by replacing with that of NIMROD KIBUKU KIRANGA, the defendant herein.

The defendant/respondent herein has stated in his replying affidavit that QUEKENDA HOLDINGS LTD was dissatisfied with the judgment of this Court and appealed to the Court of Appeal at Nyeri in C.A No. 61 of 2019 where a stay order was issued. A copy of that said order was annexed to the Replying affidavit and marked "N.K.K.-1". The applicant in his further affidavit admitted that indeed there is an Appeal Case No. 61/2019 and the grant of stay orders by the Superior Court. If indeed the Court of Appeal has issued an order staying any transaction or dealings in respect of L.R. No. KIINE/RUKANGA/2336 which is also the subject of this suit, then the orders being sought in the present application if granted will be in conflict with the orders of the Superior Court. On that ground alone, I find that the applicant has failed to disclose material facts necessary in determining the application. Material facts need not be facts that are favourable to the applicant. In the case of ***Ruaha Concrete Co. Ltd et al Vs Paramount Universal Bank Ltd et al, HCCC No. 430 of 2002 (U.R)***, the Court outlined the principles of non-disclosure and the consequence which will follow as a result of non-disclosure as follows:-

"The duty is not to make full and fair disclosure of all material facts, the material facts are those which is material for the Judge to know in dealing with the application as made, materiality is to be decided by the Court, and not by assessment of the applicant, and the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts known to the applicant, but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary must depend on all the circumstances of the case including:-

- (a) *The nature of the case the applicant is making when he makes the application.*
- (b) *The order for which the application is made and the probable effect of the order on the defendant or the plaintiff.*
- (c) *The degree of the legitimate urgency and the time available for the making of the inquiries".*

In view of the pending Appeal before the Court of Appeal No. 61/2019 (Nyeri) and orders issued by the Superior Court staying execution of the judgment and decree in ELC Case No. 737 of 2013 (Kerugoya) and in particular stay of any transactions in L.R. No. KIINE/RUKANGA/2336 pending the hearing and determination of the said Appeal, the present application is devoid of any merit and the same is hereby dismissed with costs. It is so ordered.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 12th day of February, 2021.

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E.C. CHERONO

E.L.C JUDGE

In the presence of:-

1. Mr. Igati Mwai holding brief for Kahuthu for Applicant
2. Wanjiru holding brief for Wambugu for the proposed Interested party
3. Kabuta, Court clerk – present.